In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

PHILLIPS PETROLEUM COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in this case, entered on April 18, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 8-10) is not yet reported. The opinion and orders of the Federal Power Commission (J.A. 143-158)[1] are reported at 35 F.P.C. 40, and its opinion on rehearing (J.A. 216-224) at 35 F.P.C. 321.

---

[1] "J.A." references are to the joint appendix in the court of appeals.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, pp. 11-14) were entered on April 18, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

The Commission issued permanent certificates of public convenience and necessity authorizing certain independent producers of natural gas to sell at initial rates not to exceed the rates found just and reasonable in the *Permian Basin Area Rate Cases*. The Tenth Circuit, having already set aside the Commission's rate determinations in *Permian*, remanded the present case on the basis of its *Permian* decision. The question presented is whether the court of appeals erred in holding that the Commission's rate determinations in *Permian* were unlawful and for that reason an improper basis for the rate condition in the instant certificates.

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows:

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the * * * sale of natural gas, subject to the

jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *.

* * * [T]he Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly * * *.

Section 7(e), 15 U.S.C. 717f(e):

* * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT

In a consolidated proceeding under Section 7 of the Natural Gas Act, the Federal Power Commission issued permanent certificates of public convenience and necessity authorizing certain sales of natural gas by independent producers in the Permian Basin on condition that the sales prices not exceed the applicable area rate as determined in the *Permian Basin Area Rate Proceeding*, 34 F.P.C. 159, 418, 424, 1068, 1082. This was in accordance with the policy announced by the Commission in the *Permian* proceeding of conditioning future certificates for Permian sales at the level of the rates found to be just and reasonable in that decision. A moratorium on future rate increase filings, similar to the moratorium in *Permian*, was also imposed here (J.A. 152-153).

The producers had attempted to justify their contract prices (all of which exceeded the *Permian* area rates) on the basis of (1) cost evidence and (2) alleged special premium qualities of the gas and special benefits to the purchaser. In addition, Mobil Oil Corporation sought to show that its contract had been executed after January 1, 1961, so as to qualify for the new gas-well gas price of 16.5¢ rather than the 14.5¢ price applicable to gas-well gas contracts executed prior to that date.

The Commission sustained the exclusion of the proffered cost evidence in reliance on this Court's decision in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (J.A. 149-150). The Commission held that the attempt to justify the con-

tract prices on the basis of alleged premium features was an effort to modify the applicable area rate, which already reflected quality adjustments, and should be changed only in an area rate proceeding, not in a certificate case. It stated (J.A. 148):

> To permit the introduction in the certificate proceeding of evidence directed to obtaining changes in the applicable area rate, whether by the introduction of new quality standards or otherwise, would give rise to delay in the processing of certificates, will result in a great and unnecessary administrative burden, and, in the long run, cause unnecessary expense to the producers. The proper forum for determining any change in area rates, including quality adjustments, is in the area rate proceeding. * * *

The Commission also declined to consider proffered extrinsic evidence to contradict the date of execution shown on the face of the Mobil contract and held that the *Permian* old gas-well gas price of 14.5¢ per Mcf applied, not the higher 16.5¢ per Mcf new-gas price (J.A. 150-152). The Commission denied petitions for rehearing filed by producers (J.A. 215-224), who then instituted these judicial review proceedings.

While the producers challenged the Commission's adoption in this case of the price and moratorium provisions announced in *Permian* even assuming their validity in *Permian*, and also the Commission's contract-date finding for the Mobil sale, the court of appeals set aside the Commission's orders and remanded the case to the Commission solely on the basis of its decision setting aside the Commission's *Permian*

rate determinations (*Skelly Oil Co.* v. *Federal Power Commission*, 375 F. 2d 6). The court explained (App. A, *infra*, p. 10):

> * * * The Commission's action now before us for review is based on its Permian rates. We have not accepted those rates. The elimination of the base eliminates all rates predicated thereon.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Tenth Circuit set aside the Commission's orders in the present case solely on the basis of the court's *Permian* decision, which is challenged in the *Permian Basin Area Rate Cases*, Nos. 90, etc., this Term, pending on writs of certiorari. If this Court sustains the Commission's *Permian* decision, the present case should be remanded to the Tenth Circuit to decide the issues left open by it.

CONCLUSION

Accordingly, this petition for a writ of certiorari should be held pending the Court's final decision in the *Permian Basis Area Rate Cases*, Nos. 90, etc., this Term, and then disposed of summarily in accordance with that decision.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
Federal Power Commission.

JULY 1967.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 8723, 8778, 8808 and 8829
MARCH TERM, 1967

PHILLIPS PETROLEUM COMPANY; UNION OIL COMPANY OF CALIFORNIA; GULF OIL CORPORATION; and MOBIL OIL CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY; SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA; SAN DIEGO GAS & ELECTRIC COMPANY; THE PEOPLE OF THE STATE OF CALIFORNIA and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; and THE STATE OF TEXAS, INTERVENORS

ON PETITIONS FOR REVIEW OF
ORDERS OF THE FEDERAL POWER COMMISSION

[Filed April 18, 1967]

* * * * *

PER CURIAM.

The petitions by independent producers of natural gas seek review of Federal Power Commission Opinion No. 484 and accompanying orders. These relate to § 7 applications for certificates of public conven-

ience and necessity covering jurisdictional sales of natural gas produced from various fields located within the Permian Basin. By its Opinions Nos. 468 and 468-A the Commission fixed area rates for Permian Basin gas. In the instant proceedings, the Commission held that the area rates established by it in Permian were the in-line rates for certification under § 7. The petitioners offered evidence to show that the area rates were not properly applicable and the Commission rejected the offer. It also declined to receive evidence pertaining to the effective date of a contract between petitioner Mobil Oil Corporation and El Paso Natural Gas Company.[1]

In Skelly Oil Company, et al. v. Federal Power Commission, 10 Cir., —— F.2d ——, we granted all petitions for review which attacked the Commission's Permian decision and remanded all cases for further proceedings consistent with our opinion. The cases at bar were briefed before that opinion was rendered. Phillips says in its brief: "To the extent that *Permian* is altered upon judicial review, the instant decision must reflect the result of *Permian*." None of the other petitioners are so explicit. The Commission agrees with Phillips.[2] We declined to accept the Commission's Permian rates because they had not been measured against the end result test announced in Federal

---

[1] This is pertinent because of the Commission's January 1, 1961, date of division between new and old gas-well gas.

[2] The statement in the Commission brief is: "We agree with petitioners (Phillips Br. pp. 5-6) that if this Court were to conclude in reviewing the area rate decision in *Skelly* that the prescription of producer rates on an area basis were unlawful or that either the rate or moratorium provisions there require a modification, a remand would be required here."

Power Commission v. Hope Natural Gas Co., 320 U.S. 591, and, on the record presented to us, could not be so measured.

In the circumstances, we see no good purpose that will be served by a discussion of, or decision on, any of the points raised herein by any party. At the moment they are hypothetical so far as we are concerned. The Commission's action now before us for review is based on its Permian rates. We have not accepted those rates. The elimination of the base eliminates all rates predicated thereon.

We are told that certiorari applications to review our Permian decision will be filed soon in the United States Supreme Court. When area rates for the Permian Basin receive final judicial approval, the issues presented here will be ripe for decision. If we were to decide them now, we would be rendering an advisory opinion. We now decide only that the rates fixed by Opinion No. 484 and accompanying orders are disapproved because they are based entirely on the Permian area rates which we have rejected.

The petitions for review are severally granted and the cases are all remanded to the Commission for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Twenty-third Day, March Term,
Tuesday, April 19, 1967

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges

No. 8723

PHILLIPS PETROLEUM COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY; SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA; SAN DIEGO GAS & ELECTRIC COMPANY; THE PEOPLE OF THE STATE OF CALIFORNIA and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; and THE STATE OF TEXAS, INTERVENORS

ON PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL POWER COMMISSION

This case came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion of the court.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Twenty-third Day, March Term,
Tuesday, April 19, 1967

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges

No. 8778

UNION OIL COMPANY OF CALIFORNIA, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY; SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA; SAN DIEGO GAS & ELECTRIC COMPANY; THE PEOPLE OF THE STATE OF CALIFORNIA and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; and THE STATE OF TEXAS, INTERVENORS

ON PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL POWER COMMISSION

This case came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion of the court.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Twenty-third Day, March Term,
Tuesday, April 19, 1967

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges

No. 8808

GULF OIL CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY; SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA; SAN DIEGO GAS & ELECTRIC COMPANY; THE PEOPLE OF THE STATE OF CALIFORNIA and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; and THE STATE OF TEXAS, INTERVENORS

ON PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion of the court.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Twenty-third Day, March Term,
Tuesday, April 19, 1967

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges

No. 8829

MOBIL OIL CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS AND ELECTRIC COMPANY; SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA; SAN DIEGO GAS & ELECTRIC COMPANY; THE PEOPLE OF THE STATE OF CALIFORNIA and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; and THE STATE OF TEXAS, INTERVENORS

ON PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL POWER COMMISSION

This case came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered by this court that the petition for review is granted and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion of the court.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 269388 12